No. 83-747

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Petitioner,

v.

PAUL D. JOHNSON, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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JOINT BRIEF OF CERTAIN METRO SUBWAY CONSTRUCTION CONTRACTOR-EMPLOYERS AS AMICI CURIAE IN SUPPORT OF THE JUDGMENT OF THE COURT OF APPEALS

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IDENTITY AND INTERESTS OF AMICI

Amici are prime contractors engaged at various times after July, 1971 by the Washington Metropolitan Area Transit Authority (WMATA) to perform Phase II subway construction work. *See* Pet. Br. 5-6, 8 (J.A. 110-111, 312).* These entities, which were successful contract bidders, are: Gordon H. Ball, Inc.; Fruin-Colnin; Granite Construction Company; S. A. Healy Company; MacLean-Grove-Skanska Joint Venture; Morrison-Knudsen

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* Petitioner and Respondents have consented to the filing of this Joint Amici Brief. The letters of consent have been filed with the Clerk of the Court.

Contractors; and, Slattery Associates, Inc. Amici support the judgment of the Court of Appeals in its determination that WMATA, if viewed as a volunteer, was not entitled to an employer's immunity from suit under the District of Columbia Workers' Compensation Act. The contractor-employers who did secure compensation benefits are entitled to the statutory immunity. However, Amici believe that WMATA can have immunity, as a matter of policy, but not at their expense. That is, this Court could interpret the Act, under the unique circumstances of the innovative and beneficial Wrap-Up insurance program, as providing a general contractor or builder with § 905(a) immunity together with the contractor-employers.

These entities appeared as Amici before the United States Court of Appeals (J.A. 5). The plaintiffs in each of these cases had been employed by one or more of the Amici.

However, none of these Amici was a party to this litigation at the time of the decisions of the United States District Court judges (Pet. App. 1a-26a). Thus, none was in an adversarial role as to the present question. In spite of this, two of the district judges expressly encouraged the plaintiff employees to bring common law suits against their contractor-employers (Pet. App. 11a n.2, 17a-18a). Thereafter, Amici, and other employers, began to be named as defendants in direct tort actions brought by their former construction employees. Amici are presently parties defendant in various Metro Subway Litigation cases now pending before the United States District Court for the District of Columbia. *See* Pet. Br. 36-37 & n.49. The workers bringing suit had also claimed workmen's compensation benefits from these same employers.

In its Brief, WMATA presents itself as a builder or general contractor. Petitioner argues that it had a duty to secure workers' compensation insurance pursuant to the provisions of § 904 of the Longshoremen's and Har-

bor Workers' Compensation Act (LHWCA or Act). Then, having fulfilled its "duty," WMATA concludes that it is entitled to immunity from employee common law suits by virtue of the provisions of § 905(a) of the Act. That argument, if accepted, may result in a denial of immunity to the Amici, contrary to the purposes of the Act and the guarantees made in WMATA's Coordinated Insurance Program (J.A. 104).

Amici submit that they have a direct interest in the present case. The Court of Appeals refrained from determining whether they, as employers, "secured" the payment of compensation benefits for their injured workers. However, the decision below can be read to conclude that the § 905(a) immunity is available either to a securing general contractor or a securing employer, but not both. Thus, Amici find themselves in a position of having potentially lost the benefit that they assumed they had, without ever having been in an adversarial position when the question was decided.

These prime contractors are presently at risk. A decision by this Court could result in a denial of the employer's exclusive liability, the continued prosecution of claims by former employees of Amici and the institution of many additional suits. It is for these reasons that Amici appear.

INTRODUCTION AND SUMMARY OF ARGUMENT

This litigation presents an issue of statutory construction under the District of Columbia Workmen's Compensation Act of 1928, ch. 612, §§ 1-3, 45 Stat. 600 (1928) (codified at D.C. Code 1973 §§ 36-501, *et seq.*). That statute extended the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq.* (1976), to private sector employment in the District of Columbia.

When the facts which govern the proceedings below are fully understood, it becomes clear that these Amici did secure the payment of workers' compensation benefits to Respondents, and all of their Phase II construction workers, through their participation in WMATA's bid offering process and their bids. Each contractor-employer was a named insured on the CIP Workmen's Compensation Policy and benefits were paid to injured workers. Each Phase II contractor, therefore, complied with § 904(a) of the Act and is thereby entitled to the employer's "exclusive liability" or immunity provided by § 905(a).

The question before this Court is not, as between WMATA and its contractors, which should enjoy § 905 (a) immunity. That is, the issue should not be framed as an either/or choice. In its Reply Brief, Petitioner acknowledged that *both* WMATA and its contractors could be deemed to have secured workmen's compensation benefits. *See* Pet. Reply at 4. Amici share this view.

ARGUMENT

I. THROUGHOUT THEIR PHASE II METRO CONSTRUCTION ACTIVITIES EACH CONTRACTOR-EMPLOYER WAS INSURED FOR DISTRICT OF COLUMBIA WORKERS' COMPENSATION LIABILITY

During the first two years of the Metro subway construction project, each contractor secured its own worker's compensation insurance and included the cost of such premiums in its bid. For administrative reasons, as fully set forth in Petitioner's brief, WMATA instituted a Coordinated Insurance Program (CIP or Wrap-Up) which became effective on July 30, 1971. For all projects beginning on or after October 1, 1971, WMATA provided comprehensive liability and compensation coverage for all of its contractors on all construction sites (J.A. 104, 128). Full coverage was purchased by WMATA and was in place before a single bid was solicited or be-

fore the identity of any ultimate contractor became known.

During Phase II, all potential contractors were advised that compensation insurance existed. In the Insurance Specifications which accompanied a bid offering, WMATA stated: "Insurance premium cost for coverages provided are paid by WMATA and contractors are expected to recognize this fact in submitting their bids" (J.A. 104). Of course, a contractor could obtain duplicate coverage at his own expense, but as a practical matter the cost of that insurance would ensure the rejection of the bid. The Insurance Specifications also expressly stated that WMATA would procure workers' compensation insurance "for the benefit of contractors and others" (J.A. 106).

As a result of the Wrap-Up, each successful bidding contractor became a named insured on the compensation policy and was issued a certificate of insurance in its own name at the time that the bid was accepted (J.A. 128, 225). At no time was WMATA a named insured for workers' compensation (J.A. 128). Indeed, all compensation payments made to date for any worker injury claim have been paid in the name of the appropriate employer-contractor (J.A. 47-61).

Petitioner's Brief correctly notes that the contractors did not "purchase" the insurance applicable to the Metro project. WMATA also states that the bid offering allowed any bidder to purchase its own insurance if desired. These statements may create an impression that the contractors chose not to secure insurance after having been offered the opportunity to do so. Such is not the case.

The workmen's compensation policy on which each contractor was an express, named insured, provided "statutory" coverage limits and specifically included "all com-

pensation and other benefits required of the insured by the workmen's compensation law" (J.A. 106, 113). The term "workmen's compensation law" included the law of the District of Columbia (J.A. 114, 127).

Accordingly, each Phase II contractor employer was explicitly and automatically insured for its total statutory workmen's compensation liability under the District of Columbia worker's compensation law during its participation in any given Metro construction project (J.A. 266-267).

By agreeing to become a named insured on the CIP workmen's compensation policy, each contractor-employer expressly undertook various specified duties and responsibilities.[1] These included: cooperating and assisting in the resolution of claims and lawsuits (J.A. 120); cooperating with the policy issuing insurance company (J.A. 110); and, providing notice of any injury, claim or suit (J.A. 119-120). Moreover, by accepting the policy, each contractor-employer adopted the declarations' statements as its own agreements and representations upon which the insurer relied in issuing the policy (J.A. 124).

In short, each Phase II contractor was a true insured under the CIP workmen's compensation policy throughout its participation in Metro construction activities (J.A. 128).

The Amici, whether contractors or subcontractors, certainly concluded that they did secure workmen's compensation insurance. They honored WMATA's bid offering, accepted the proferred coverage and eliminated that po-

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[1] They also could have been required, in the event of a cancellation of the CIP insurance, to purchase alternative insurance on a reimbursable basis (J.A. 108-109). Coverages not provided under the Program were required by WMATA to be procured by each contractor/subcontractor (J.A. 216-218).

tential cost from their bids. They were each provided with a certificate which named them, and not WMATA, as the insured on the Compensation Policy (J.A. 128). Thus, they continually carried the required insurance. The suggestion made that since WMATA paid for the insurance, it, rather than the contractors secured it, does not bear close scrutiny. WMATA would "pay" for insurance in one way or another: either the cost would be indirectly borne by the Authority through higher bids (if contractors were to include the cost of their own insurance), or the cost would be directly absorbed as part of the Wrap-Up.

The Amici at no time were "uninsured" and at no time did they fail to carry compensation insurance for their employees. As previously demonstrated, each successful bidder on the Metro subway construction project was assured of complete, adequate compensation insurance coverage at the very instant that the bid was accepted. The bidders had eliminated the cost of procuring their own insurance at the behest of WMATA.

For WMATA to state that it had a duty to procure insurance for its "sub-contractors" because they had not done so is an argument that has come as no small surprise to the Amici. In reality, the history of the Coordinated Insurance Program is plain. The Authority made a deliberate decision to embark upon a Wrap-Up plan which provided many benefits, including a substantial savings in overall costs.

But, subsequent arguments before various district judges created the mistaken impression that the contractors had been derelict in their statutory duties. That is simply not true. The Amici insured the payment of workers' compensation benefits to their employees by bidding successfully on a project.

II. ALL PHASE II CONTRACTORS SECURED THE PAYMENT OF COMPENSATION BENEFITS AND ARE ENTITLED TO THE EMPLOYER'S IMMUNITY

As this Court has recognized, the LHWCA is not "a simple remedial statute intended for the benefit of workers." *Morrison-Knudsen Construction Co. v. Director, OWCP*, 103 S.Ct. 2045, 2052 (1983). Rather, the Act rests upon compromise and strikes a balance between the interests of employees in immediate benefits for work-related injuries and the interests of employers in finite and predictable liability to those employees.

An employer's interest is recognized in § 905(a) of the Act which states, in relevant part: "The liability of the employer prescribed in § 904 [*i.e.* to secure the payment of compensation benefits] shall be exclusive and in place of all other liability of such employer to the employee. . . ."

Under § 905(a), an employer is expressly made immune from tort liability to an employee except where that employer "fails to secure payment of compensation. . . ." That is, an employer's exclusive liability is to provide workmen's compensation benefits to an insured worker unless it has not made such benefits available.

Here, the undisputed facts described above demonstrate that the Metro Phase II subway construction contractors did secure the payment of compensation benefits for their employees as required by the Act. Indeed, the District of Columbia Court of Appeals has so determined. In *Edwards v. Bechtel Associates Professional Corp.*, 466 A.2d 436, 438 (D.C. App. 1983), *cert. denied*, No. 83-560 (Nov. 28, 1983), that court held: "[n]otwithstanding that WMATA paid for the insurance, appellants' employers [Metro contractors] did secure the compensation payments under the terms of their contracts with WMATA. Further, compensation claims were made with appellants' employers and against their

named policies. We are satisfied, therefore, that the statutory requirement has been met."

This determination is consistent with other District of Columbia court decisions which have rejected the view that § 905(a) exclusive liability should flow to the entity which ultimately bears the costs of construction compensation insurance. *DiNicola v. George Hyman Construction Co.*, 407 A.2d 670, 674 (D.C. App. 1979); *Lindler v. District of Columbia*, 502 F.2d 495 (D.C. Cir. 1974).

The requirement under § 904(a) that an employer "secure the payment of compensation benefits" does not mean that the employer must itself pay premiums to purchase workmen's compensation insurance. That may be one method selected by an employer but it is not the exclusive avenue available. Where, as here, construction employers contractually agree to become insureds under a compensation policy, and forego the inclusion of insurance costs in their bids, they obligate another to pay compensation and thereby secure benefits for their employees. This method meets the intent of § 904(a) "to protect injured employees engaged in a common enterprise from the irresponsible failure of their immediate employers to insure." *Director, OWCP v. National Van Lines, Inc.*, 613 F.2d 972, 986 (D.C. Cir. 1979), *cert. denied*, 448 U.S. 907 (1980). It also comports with § 932 of the Act which requires that an employer secure the payment of compensation "by insuring and keeping insured the payment of such compensation with any stock company or mutual company or association, or with any other person or fund. . . . ."

Under the Act and as a matter of substance, the contractor-employers secured the payment of compensation benefits. *See* A. Larson, *The Law of Workmen's Compensation*, § 67.22 at 12-82, 83 (1982) (noting that courts focus on substance and not form to determine whether

an employer has secured compensation benefits). They are entitled, therefore, as a matter of plain statutory application to the "exclusive liability" or immunity provided under § 905(a) of the Act.[2]

III. THE PROPER APPLICATION OF THE QUID PRO QUO DOCTRINE SUPPORTS THE CONTRACTORS' IMMUNITY

The decision of the Court of Appeals expressed the view that had WMATA been legally required to purchase workmen's compensation insurance for its construction contractors it could have received the Section 905(a) employer's "immunity" (Pet. App. 54a-55a). Petitioner has noted this view and asserts its validity in the *quid pro quo* context. *See* Pet. Br. at 15.

Amici suggest that, as a matter of policy and under the unique circumstances of the Wrap-Up insurance program, WMATA may be entitled to the benefit of some type of immunity. However, to the extent that any suggestion is made that immunity can be given to WMATA to the exclusion of the contractors, the Amici reject such a theory as contrary to the Act and its *quid pro quo* foundation.

The *quid pro quo* or compromise nature of workmen's compensation statutes has been expressly recognized by this Court.[3] In *Cardillo v. Liberty Mutual Insurance*,

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[2] Public policy supports § 905(a) immunity for the contractors. The contractors secured the payment of compensation benefits by contract and in good faith. Their efforts should not be frustrated by a narrow application of the Act. Elimination of the employer's statutory exclusive liability would expose contractors to indeterminate tort liability, a result plainly not bargained for by the contractors. Denial of immunity would also, of necessity, increase construction costs for large projects, such as Metro, due to a duplication of insurance costs.

[3] This Court in Crowell v. Benson, 285 U.S. 22, 38 (1932) has stated that the master-servant employer relationship was a fundamental requirement supporting the constitutionality of the LHWCA.

330 U.S. 469 (1947), Justice Murphy described the doctrine in relation to the Act at issue here:

> A prime purpose of the Act is to provide residents of the District of Columbia with a practical and expeditious remedy for their industrial accidents and to place on District of Columbia employers a limited and determinate liability.

330 U.S. at 476.

More recently, in *Potomac Electric Power Company v. Director, OWCP*, 449 U.S. 268 (1980), this Court again recognized that "the LHWCA represents a compromise between the competing interests of disabled laborers and their employers," citing with approval the following commentary:

> Workmen's compensation acts are in the nature of a compromise or quid pro quo between employer and employee. Employers relinquish certain legal rights which the law affords to them and so, in turn, do the employees. Employers give up the common-law defenses of the fellow servant rule and assumption of risk. Employees are assured hospital and medical care and subsistence during the convalescence period. In return for a fixed schedule of payments and a fixed amount in the event of the worker's death, employers are made certain that irrespective of their fault, liability to an injured workman is limited under workmen's compensation. Employees, on the other hand, ordinarily give up the right of suit for damages for personal injuries against employers in return for the certainty of compensation payments as recompense for those injuries. 1 M. Norris, The Law of Maritime Personal Injuries § 55, p. 102 (3d ed. 1975).

449 U.S. at 282 and n.24.

The *quid pro quo* flows between the employee and his/her employer. Each gives up certain rights but receives concomitant benefits. Employees, such as Respondents,

forego an ability to file common law tort actions against their employers but they receive certain and immediate compensation benefits. Employers, such as Amici, give up certain common-law defenses while securing the payment of compensation benefits to their injured employees. As an essential part of this compromise process, the employer receives a limitation on its liability to injured employees. That liability is limited to compensation benefits. *See* 33 U.S.C. § 905(a).[4]

Under the Act, the *quid pro quo* analysis must focus upon the master-servant employment relationship. Here, the Respondent/employees filed for and received compensation benefits. These claims for compensation were lodged against the appropriate contractor-employers (J.A. 64, 66). Benefits were received through a workmen's compensation policy which insured each contractor-employer for its total statutory liability (J.A. 51, 56, 128). Under these circumstances, the *quid pro quo* process functioned as intended and the Section 905(a) employer's exclusive liability for compensation was achieved. The fact that a general contractor or builder, which was not a direct employer, purchased the workmen's compensation policy to benefit the contractor-employers does not alter the analysis.[5]

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[4] An employer which does not secure the payment of compensation benefits remains liable either for workers' compensation or for negligence, at the election of the injured employee. If a tort action is filed, the employer is precluded from asserting the affirmative defenses of fellow-servant negligence, assumption of the risk and contributory negligence. 33 U.S.C. § 905(a). A non-employer, as defined in 33 U.S.C. § 933(a), may be subject to suit in tort but does not forego any defenses. This statutory scheme implicitly recognizes, therefore, that a true third party cannot participate in the *quid pro quo* process since it gives up no rights.

[5] This Court's decision in Jones Laughlin Steel Corp. v. Pfeifer, 76 L.Ed.2d 768 (1983) would appear to preclude an owner from obtaining § 905(a) immunity, even if it pays compensation as an employer, when the provisions of § 905(b) apply.

Therefore, to the extent that the decision of the Court of Appeals suggests that the employer's exclusive liability under Section 905(a) can be taken from the contractors under the facts presented here, that suggestion should be rejected.

CONCLUSION

Under the Act and the cases construing the statutory provisions at issue here, the ultimate judgment of the Court of Appeals can be affirmed while recognizing that the Metro construction contractors have immunity which may also be shared by WMATA.

Respectfully submitted,

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